STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA, PSYCH TECHS, LOCAL 11555,	)	
Charging Party,	)	Case No. S-CE-261-S
v.	)	PERB Decision No. 542-S
STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION, MENTAL HEALTH, AND DEVELOPMENTAL SERVICES,	)	December 13, 1985
Respondent.	)	

Appearances; Law Offices of Ronald Rosenberg by Ronald Rosenberg, and Kanter, Williams, Merin & Dickstein by Howard L. Dickstein for Communications Workers of America, Psych Techs, Local 11555; Lester R. Jones for State of California, Department of Personnel Administration.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Communications Workers of America, Psych Techs, Local 11555 (CWA or Charging Party) of the partial dismissal of an unfair practice charge filed against the State of California (Departments of Personnel Administration, Mental Health, and Developmental Services) (DPA).

We have reviewed the regional attorney's partial dismissal, attached hereto, and modify his conclusions as detailed below.

DISCUSSION

PERB Regulation 32615[1] sets forth the required contents of an unfair practice charge and obligates the charging party to, inter alia, include in its charge a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." PERB Regulation 32630 authorizes dismissal and refusal to issue a complaint "if the Board agent concludes that the charge or the evidence is insufficient to establish a prima facie case . . . ."

Here, the gravamen of CWA's charge is that DPA unlawfully gave support to the California Association of Psychiatric Technicians (CAPT) and engaged in conduct that persuaded unit employees to vote to decertify CWA. To support such a violation of section 3519(d) of the State Employer-Employee Relations Act (SEERA or Act),[2] charging party need demonstrate only that the employer failed to maintain strict neutrality. The threshold test is whether the employer's conduct "tends to influence that

---

[1]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

[2]SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

SEERA section 3519(d) makes it unlawful for the State to:

> Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

choice or provide stimulus in one direction or another." Santa Monica Community College District (1979) PERB Decision No. 103. And see Clovis Unified School District (1984) PERB Decision No. 389.

In the instant case, the regional attorney seems to have reviewed each numbered paragraph of the charge in isolation and assessed each factual allegation contained in the charge as if it were singularly being offered as evidence of a prima facie violation. Accordingly, he found that memoranda detailing "agreements" between CAPT and DPA and memoranda listing CAPT "representatives" could not, without more, be considered unlawful assistance to CAPT. We find such an analysis inappropriate.

It is CWA's claim that the employer's conduct "taken together" lent assistance to CAPT and discriminated against CWA. In the amended charge, the Charging Party set forth "the following factual incidents . . . offered in support" of the charge. Absent the fact that CWA numbered the paragraphs setting forth the factual allegations, there is no basis to interpret CWA's allegations in such a manner as to require each paragraph or each document referred to therein to stand alone as a prima facie case. Thus, while we agree with the regional attorney's opinion that the specific documents identified in the charge cannot, without more, be considered to show unlawful assistance, CWA makes no such claim.

In our view, the critical inquiry is whether the factual allegations set forth in the charge, if true, would lend support

to the legal theory that the Charging Party puts forth. Each individual factual assertion need not stand alone as conduct violative of the Act but, rather, the totality of circumstances must be considered. Thus, in the instant case, the individual factual allegations dismissed by the regional attorney must be considered in light of those aspects of the charge upon which a complaint issued and which the regional attorney found sufficient to state a prima facie case.

The complaint refers to three documents alleged to have been posted on various employee bulletin boards: (1) a February 26, 1985 memo from the DPA senior labor relations officer, Ivonne Ramos Richardson, which "recognized" CAPT as an employee organization; (2) a March 5, 1985 memo from Gary W. Scott, labor relations specialist, Department of Developmental Services, which set forth CAPT's access rights; and (3) a June 4, 1985 memo from Denise P. Bates, personnel officer/labor relations coordinator, Department of Mental Health, which announced the removal of one CWA steward and identified seven employees as CAPT stewards. In addition, the complaint refers to several unilateral changes in CWA's access rights, CAPT's use of an executive conference room, and a statement by an employer agent expressing preference for CAPT.

Given that the regional attorney found a prima facie case of unlawful support based on the "course of conduct" described in all of the factual allegations of the complaint set forth above,

we are uncertain why the specific portions of CWA's charge at issue here were dismissed. In our view, the dismissed allegations are of the same general nature as those that were included in the complaint. It, therefore, seems more appropriate to view all of the documents together, with each capable of lending support to the underlying claim.

Similar to the documentary allegations, CWA alleges that the unit modification petition was also a part of an employer campaign to influence unit members to support CAPT. However, the regional attorney dismissed the unit modification allegation because CWA failed to provide specific facts indicating when, how and by whom DPA communicated to senior psych techs that they would not receive salary parity with nurses unless they were excluded from Unit 18. In the appeal, CWA specifically responds to the regional attorney's inquiry regarding promises of salary parity and refers to employee declarations. In his summary of the employee declarations, however, the regional attorney maintains that CWA claims only that "unnamed members of management told senior psych techs that they would get parity with RN's if they were not in Unit 18."

The employee declarations referred to above were not attached to CWA's fourth amended charge, nor were they heretofore made a part of the official case file.[3] Thus, it

[3]Inasmuch as CWA's appeal includes numerous and specific references to these declarations, we direct that, at this juncture, they be attached to the charge and made part of the official record.

was impossible for us to evaluate the declarations and reach our own factual conclusions. Nevertheless, we do not find it fatal to the charge that CWA's declarants failed to name the managerial personnel. First, it bears emphasizing that CWA's charge refers to the filing of the unit modification petition as a factual incident in support of its charge. There is no assertion that, standing alone, the unit modification request constitutes a prima facie case. Moreover, at this stage of these proceedings, CWA's declarations should be read as representations that individuals can and will testify as to certain facts. At any subsequent evidentiary proceeding, due process guarantees will ensure that the employer be given an opportunity to fully cross-examine witnesses called by CWA and, through its own witnesses, to rebut the allegations surrounding its unit modification effort. Further, we see no reason to refuse to consider CWA's allegations that the very timing of the unit modification petition, when viewed together with the employer's other conduct, supports its allegation of illegal support for CAPT.

In sum, we read CWA's charge as an allegation that DPA lent unlawful support to CAPT. In support of that contention, it set forth a number of factual contentions alleged to constitute an unfair practice. Assuming that its factual allegations are true (San Juan Unified School District (1977) EERB Decision

No. 12),[4] the question before the regional attorney should be whether, taken together, the allegations support a prima facie case that the employer's conduct violated section 3519(d). Viewed in this light, we believe that the pleading requirements were satisfied. While we fully agree with the regional attorney's conclusion that, standing alone, the specific factual assertions are insufficient to demonstrate a prima facie case, CWA makes no such contention. CWA may, therefore, proceed to an evidentiary hearing on the complaint that issued and, to the extent deemed relevant by the administrative law judge, it may rely on the factual allegations discussed above to support its burden of proof.

ORDER

The regional attorney's partial dismissal of CWA's charge is REVERSED in accordance with the above discussion. It is hereby ORDERED that those dismissed portions of the charge be consolidated with the complaint.

Chairperson Hesse and Member Porter joined in this Decision.

---

[4]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

August 6, 1985

Howard Dickstein
Kanter, Williams,
Merin & Dickstein
1014 9th Street
Sacramento. CA 95814

Re: Communication Workers of America. Psych Techs. Local 11555 v. State of California (Departments of Personnel Administration. Mental Health, and Developmental Services) Unfair Practice Charge No. S-CE-261-S. Fourth Amended Charge

Dear Mr. Dickstein:

The above-referenced charge alleges that the State of California. Departments of Personnel Administration. Mental Health and Developmental Services (State) unilaterally changed policies affecting employees exclusively represented by the Communications Workers of America, Psych Techs Local 11555 (CWA) and illegally assisted the California Association of Psychiatric Technician (CAPT). This conduct is alleged to violate sections 3519(a). (b). (c) and (d) of the State Employer-Employee Relations Act (SEERA).

I indicated to you in my letter dated July 22. 1985 that certain allegations contained in the third amended charge did not state a prima facie case, and that unless you amended these allegations to state a prima facie case, or withdrew them prior to July 29, 1985, they would be dismissed. More specifically, I informed you that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly.

On July 24, 1985, Dennis Sullivan wrote to you and Ronald Rosenberg, Esq.. clarifying the July 22 letter and extending the deadline for filing to July 31. 1985. On August 2. the fourth amended charge was filed along with a Brief of CWA in Support of Issuance of Complaint and nine declarations. The fourth amended charge contains the same factual allegations as the third amended charge. The information presented in the nine declarations can be summarized as: (1) employee organization bulletin boards had never before been used to post management memoranda, (2) management memoranda described in the charge were posted on employee organization bulletin boards at Camarillo and Napa

State Hospitals, (3) the memoranda described in the unfair practice charge gave employees the impression that the CAPT had the "inside track" or could represent psychiatric technicians better than CWA, (4) unnamed employees worried that open support for CWA would result in employer retribution, (5) a supervisor at Camarillo showed employees CAPT literature and lists of CAPT stewards, and (6) unnamed members of management told senior psychiatric technicians that they would get parity with registered nurses if they were not in unit 18.

Based on the information presented in the nine declarations, the fourth amended charge, and all other information provided by the Charging Party and Respondent, the following allegations are dismissed based on the rational contained in the July 22 and 24 letters (attached as exhibits A and B respectively): allegations 1-4 with respect to all memoranda except the February 26 letter from Ivonne Richardson and the March 5 memorandum from Gary Scott;[1] 8, 9, 10, 14, 15 and 16.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (section 2635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on August 26, 1985, or sent by telegraph or certified United States mail postmarked not later than August 26. 1985 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

---

[1]A complaint will issue concerning the allegation that the February 26 and March 5 communications constituted favoritism toward CAPT, however, the theory that these two documents violate the SEERA because they grant access prior to the existence of a question concerning representation (QCR) is dismissed.

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and. if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Very truly yours.

DENNIS M. SULLIVAN
General Counsel

By
ROBERT THOMPSON
Regional Attorney

cc: Ronald Rosenberg, Esq. (Express Mail)

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

July 22, 1985

Howard Dickstein
Kanter, Williams,
Merin & Dickstein
1014 9th Street
Sacramento, CA 95814

Re: Communication Workers of America, Psych Techs, Local 11555 v. State of California (Department of Personnel Administration and Department of Developmental Services)

Unfair Practice Charge No. S-CE-261-S

Dear Mr. Dickstein:

The above-referenced charge alleges that the State of California, Department of Personnel Administration and Department of Developmental Services (State) illegally assisted the California Association of Psychiatric Technician (CAPT). This conduct is alleged to violate sections 3519(a) and (d) of the State Employer-Employee Relations Act (SEERA).

My investigation revealed the following facts. Communication Workers of America, Psych Techs, Local 11555 (CWA) is the exclusive representative of bargaining unit 18. CWA and the State are parties to a memorandum of understanding (MOU) with effective dates of July 1, 1982 through June 30, 1985.

Allegation No. 1-4, 9

On February 26, 1985, Ivonne Ramos Richardson, a senior labor relations officer with the Department of Personnel Administration (DPA) wrote to a CAPT representative indicating:

> This is to formally notify you that the Department of Personnel Administration has recognized your organization, the California Association of Psychiatric Technicians (CAPT), as an employee organization under section 3513(a) of SEERA.

The letter goes on to explain that an employee organization making a decertification attempt is entitled to access during non-work time and in non-work areas, distribution of literature

during off-work periods and/or in places where employees congregate and use of bulletin boards in conformance with departmental policy. (Exhibit A to the original unfair practice charge.) On March 5, 1985, Gary Scott, a labor relations specialist for the Department of Developmental Services (DDS) sent a memo with a copy of the Richardson letter attached to all labor relations coordinators regarding "the recognition and access for CAPT." (Exhibit B to the original unfair practice charge.) Charging Party alleges that this Scott memorandum and/or its attachment were posted on several employee bulletin boards at several hospitals throughout the system. The State responds that posting was limited to Sonoma and Porterville State Hospitals.

On March 24, the CAPT filed a petition to decertify CWA. On April 26, the Public Employment Relations Board (PERB) issued a determination certifying the petition's validity.

On May 3, 1985, Mr. Scott issued a memorandum regarding access and bulletin board space for CWA and CAPT to labor relations coordinators. (Exhibit 1.) Charging Party asserts that copies of this memorandum were posted on employee bulletin boards at Napa, Sonoma, and Porterville State Hospitals during the month of May. On May 7 Nancy Irving, the labor relations coordinator at Lanterman State Hospital, distributed a memorandum to the executive policy group, program directors, chief, CPS, and unit supervisors which designated a group of employees as CAPT's representatives and outlined their access rights. CWA asserts and the State denies that this memo was posted on employee organization bulletin boards in the hospital. On May 29, Hal Britt, the personnel officer at Fairview State Hospital, sent a memorandum to the administrative/program directors and chief, CPS, which outlined the access rights for both CWA and CAPT and stated in part,

> Until the conclusion of the PERB election process, the department has agreed with the CAPT to the following regarding access, posting of materials, and the use of State facilities: • . .

This communication is nearly identical to the May 3 Scott memorandum.

Allegation No. 6

During the spring of 1985, just prior to a CAPT informational meeting, a CWA job steward was told by a program director at Stockton State Hospital, "I hope they beat the hell out of you." This statement was made in front of other psychiatric technicians.

Allegation No. 8

On May 7, Mr. Friday issued a memorandum to Program Directors and Unit Supervisors (not members of the bargaining unit) which included a copy of the May 3 Scott memorandum. Friday's memorandum describes the Scott communication as spelling out ". . .an agreement with the California Association of Psychiatric Technicians (CAPT) regarding the following: 1. access, 2. posting of materials, 3. use of state facilities." CWA states that these memoranda were posted on the wall set aside for union information. On May 23, Richard Friday, the hospital administrator at Napa State Hospital, distributed a memorandum to unknown recipients which listed a group of employees designated as CAPT representatives. Charging Party asserts that a member of the bargaining unit observed this memorandum on clipboard used specifically for management memoranda.

Allegation No. 10

Charles Goetchius, a CWA organizer from Sonoma State Hospital, states that he was told on June 15 by Dan Sorrick, the secretary-treasurer of CAPT and a psychiatric technician on disability leave, that Mr. Sorrick had thrown another CWA representative off of one of the hospital units. Mr. Sorrick went on to say that he had heard from the hospital administrator that Mr. Goetchius also had been asked to leave a unit by a program director.

Allegation No. 14

Article XII, section 6a of the MOU reads:

> The State shall provide an aggregate of 300 days per year of unpaid leaves of absence for purposes of attending CWA conferences, conventions, schools, or job steward training.

In March 1985, the State released approximately 75 stewards for three to five days each of training. On May 23, CWA requested the State release two employees from Napa State Hospital as soon as possible but no later than June 5 up to and including August 31, 1985. On May 24, CWA requested the State release two employees each from Napa State Hospital and Sonoma State Hospital as soon as possible but no later than June 5 up to and including August 31, 1985. On May 31, 1985, CWA requested the State release eighteen employees from seven different hospitals as soon as possible but no later than June 13 to June 30. These requests were denied by the State.

Allegation No. 15

Charging Party asserts that during the period 1981 through 1984 CWA and the State adamantly disagreed over several issues concerning unit 18. In 1985, it is alleged that the State established a management dominated employee organization at Napa State Hospital, closed a ward at Porterville Hospital and reassigned employees, claiming that CWA had agreed to the actions and denied every grievance appealed to the fourth step of the grievance procedure.

Allegation No. 16

On March 29, the State filed a unit modification petition requesting supervisory status for the classification of senior psychiatric technician. CWA filed an opposition to this petition. On June 17, the ballots in the unit 18 decertification election were mailed to employees in the unit including senior psychiatric technicians. On July 1, the State withdrew their unit modification petition. To be valid, ballots must be returned to the Public Employment Relations Board (PERB) by July 17.

Based on the facts stated above, allegations 1 through 4, one section of 6, 8, 9, 10, 14, 15, and 16 contained in this charge fail to state a prima facie violation of the SEERA for the reasons which follow.

Allegation No. 1-4, 9

Charging Party asserts that the February 26 letter from Ivonne Richardson and the March 5 memorandum from Gary Scott

violate the SEERA in two ways.[1] First, these documents show that the State employer granted access to CAPT prior to the existence of a question concerning representation (QCR), and second, these writings were posted for unit members to read which assisted CAPT by legitimizing its decertification effort through the use of the words, "recognized" and "agreement."

First, although no express provision of SEERA provides for a statutory right of access, the Public Employment Relations Board (PERB) has determined that a right of access for employee organizations is implicit in the purpose and intent of the State of California, California Department of Corrections (5/5/80) PERB Decision No. 127-S. This right of access runs to all employee organizations, not just the recognized employee organization.

In University of California, Berkeley (1984) PERB Decision No. 420-H PERB held at page 27 that:

> Employee organizations possess access rights irrespective of whether they are exclusive representatives or, as in this case, nonexclusive representatives. Since the right of access is a statutory right, it exists whether the employer and the employee organization have a formal, informal, good, bad, or no relationship at all.

Charging Party argues that there should be an exception to this right of access which would prevent a potential challenger to an incumbent employee organization from having any access until a QCR has been established. This argument is based on cases from the Federal Labor Relations Authority and its predecessor Executive Order 11491. (See Department of the Army, U.S. Army Natick Laboratories, A/SLMR No. 263 etc.) Close examination of these cases show that this rule of law is based on the peculiar language of Section I9(a)(3) of the Executive Order. This section has been read to mean that the employer may furnish access only to employee organizations which have equivalent status with the incumbent organization.

---

[1] The other memoranda (May 3rd Gary Scott, May 29th Hal Britt, and May 7 Nancy Irving) are alleged to violate the SEERA only under the second theory.

There is no language in the SEERA which is parallel to section 19(a)(3) of the Executive Order and these rulings appear to run contrary to the purpose of SEERA as expressed in section 3512. To deny competing employee organizations access would seemingly result in allowing the public and organizations such as the United Way greater access rights than these employee organizations. Such a finding has no basis in SEERA. Thus, the employer's providing of access to CAPT in this case does not state a prima facie violation of the SEERA.

Charging Party's second contention focuses on the employee's notifying employees of the Richardson and Scott documents and their use of the terms "recognized" and "agreement." Section 3515.5 of the SEERA reads in pertinent part:

> Employee organizations shall have the right to represent their members in their employment relations with the State, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the State.[2]

Charging Party argues that the February 26 letter from Ivonne Richardson and the March 5 memorandum from Gary Scott

---

[2]Section 3513 of the SEERA reads:

> As used in this chapter:
>
> (a) "Employee organization" means any organization which includes employees of the State and which has as one of its primary purposes representing those employees in their relations with the State.
>
> (b) "Recognized employee organization" means an employee organization which has been recognized by the State as the exclusive representative of the employees in an appropriate unit.

state that CAPT is the "recognized employee organization" under SEERA. These letters do not state that CAPT is the "recognized employee organization" but rather that CAPT is recognized as "an employee organization." Although the Charging Party was requested to provide information demonstrating that the State had treated CAPT as the recognized employee organization (the exclusive representative) of Unit 18 employees, no information has been provided to date.

In a similar vein, Charging Party argues that various memoranda posted in the State hospitals mention that the State had reached agreement with CAPT concerning access for CAPT representatives and that this converts CAPT into the exclusive representative. Again, the use of the terms "agreement" and "CAPT representative" do not confer exclusive representative status on the CAPT. Without more, the communications Which contain these terms cannot be considered unlawful assistant to CAPT.

These communications also appear to be covered by the employer's right of free speech and this would not violate the SEERA. Although PERB has not decided a "free speech" case under SEERA, it is reasonable to apply PERB case law decided under similar acts, the Educational Employment Relations Act (EERA) and the Higher Education Employment Relations Act (HEERA). In a series of cases, PERB concluded that, despite the fact that the EERA does not contain specific language guaranteeing employer free speech, a free speech right is implied in the language and purpose of the Act. Rio Hondo Community College District (5/19/80), PERB Decision No. 128; Antelope Community College District (7/18/79), PERB Decision No. 97? Muroc Unified School District (12/15/78), PERB Decision No. 80. In Rio Hondo, PERB held that under the EERA, an employer's speech which contains a threat of reprisal or force or promise of benefit will constitute a violation of the Act.

This standard of free speech is not affected by the presence of a competing employee organization or the existence of a question concerning representation. Santa Monica Unified School District and Santa Monica Community College District (1978_ PERB Decision No. 52; Raley's v. NLRB (1983) CA 9) 112 LRRM 3376; NLRB v. Corning Glass Works (1953) CA 1) 32 LRRM 2136; Plymouth Shoe Company (1970) 182 NLRB 1; Alley Construction Company (1974) 210 NLRB 999. The statements in

the memoranda covered by these allegations do not contain a threat of reprisal or force or promise of benefit. Accordingly, no complaint may issue on the allegation that these memoranda through their terms assisted CAPT in violation of SEERA section 35l9(d).

Allegation No» 6

Charging Party apparently argues that the statement by a program director at Stockton State Hospital, "I hope they beat the hell out of you," to a CWA job steward constitutes a violation of the SEERA. With respect to this statement, there is a significant question of employer free speech.

As discussed above, an employer's speech will not violate the SEERA unless it constitutes a threat of reprisal or force or promise of benefit. Absent such a threat, even speech which is highly critical of a particular union will not constitute a violation. In SUPA v. Regents of the University of California (12/16/83), PERB Decision No. 366-H, the PERB held that the University did not commit an unfair practice even though its supervisor told bargaining unit employees that collective bargaining was a "sham", that he did not like the "adversary climate" which collective bargaining created, and that SUPA was a "sour union." The PERB held these statements to be permissible expressions of opinion because they did not contain any threats of reprisal or promise of benefits.

Similarly, in the private sector, the National Labor Relations Board has dismissed charges where it was alleged that, during contract negotiations a supervisor told an employee, "You should see the demands that the union is asking . . . they are ridiculous; just like the bozos who want the union." Gorman Machine Corporation (7/21/81) 251 NLRB No. 10. The Board reasoned that the supervisor's statements depicting union adherents as "bozos" and illiterates were merely expressions of his personal opinion which could not reasonably tend to threaten or coerce any employee in violation of his rights. In the present case the program director's statement does not on its face carry any threat of force or promise of benefit. Without more, it can be read only as a statement of his personal opinion.

While facially non-coercive speech, such as the supervisor's statement, does not constitute a prima facie violation of the SEERA, such speech may constitute a violation when considered

as part of a total course of conduct aimed at interfering with guaranteed rights. Antelope Valley Community College District, supra; Virginia Electric and Power Company (1941) 314 US 459 [19 LRRM 4051]. However, there are no facts in the charge nor were any discovered during the investigation which would indicate that the supervisor's statement is anything more than an isolated expression of his views.

Allegation No. 8

This allegation concerns two memoranda issued by a hospital administrator at Napa State Hospital. CWA asserts that these memoranda used the "CAPT representatives" and "agreement" as well as including a copy of the May 3 Scott memorandum. As discussed above, the use of these words in insufficient in and of themselves to demonstrate a violation of section 3519(d). In addition, as outlined above, the States providing access described in the Scott memorandum does not transgressed the SEERA.

Allegation No. 10

CWA argues that the information provided in this allegation demonstrates that the Sonoma State Hospital and CAPT are in collusion. However, a close examination of the information provided indicates basically two facts, (1) that a CAPT representative, Mr. Sorrick, had obtained information from the hospital administration concerning an incident in which a CWA rep had been asked by administrator to leave a hospital unit, and (2) that Mr. Sorrick had asked a different CWA representative to leave a hospital unit. With respect to the first fact, the information obtained by Mr. Sorrick is not of a confidential nature, and without more, does not indicate that the hospital administration was in collusion with CAPT. Second, nothing indicates that Mr. Sorrick was acting on behalf of the employer. Without a showing of agency the employer cannot be held responsible for the actions of an employee organization representative. Antelope Valley Community College District (1979) PERB Decision No. 97. In either case, there is no information which demonstrates that the CWA organizer was removed from the hospital unit when he had a legal right to be there. Thus, this allegation fails to demonstrate that the Respondent has favored CAPT in any way.

Allegation No> 14

The thrust of this allegation is that the State has failed to comply with Article 12, section 6a of the MOU. However, the facts provided by the Charging Party merely states that the Respondent has denied three requests for unpaid leave affecting 29 employees. There is no indication that the State has failed to provide the aggregate of 300 days per year of unpaid leave of absence as required by the MOU. Thus, it is unclear at this point whether the State has refused to provide a portion of the 300 days required by the MOU. Without this information, no prima facie violation of the SEERA is described.

Allegation No. 15

The gravamen of this allegation is that the Respondent has assisted CAPT by refusing to honor the grievance and arbitration procedure of the MOU since January 1, 1985. Although the Charging Party has presented allegations that the State and CWA have adamantly disagreed over several employment-related issues over the last several years, there are no facts that demonstrate that the Respondent has failed to honor the grievance procedure of the MOU. The only statement related to grievances is that the State has denied every grievance which has been appealed to the fourth step of the grievance procedure. However, the denial of a grievance at a particular step of the grievance procedure does not equate with a refusal to honor the grievance procedure. Thus, there are insufficient facts to support a finding of a prima facie case with respect to this allegation.

Allegation No. 16

Charging Party asserts that the State has given assistance to the CAPT by the filing and then the withdrawing of a unit modification petition. The key to CWA's argument is the allegation that the State informed senior psychiatric technicians that they would not receive salary parity with registered nurses as long as they were in Unit 18. However, the Charging Party has failed to provide specific facts which indicate when, how, and by whom this information was communicated to senior psychiatric technicians. Without this, only two facts remain, (1) the employer filed a unit modification petition for senior psychiatric technicians, and (2) the employer withdrew its unit modification petition. These facts alone are insufficient to state a prima facie violation of the SEERA.

For these reasons, allegations numbered 1 through 4, one section of 6, 8, 9, 10, 14, 15, and 16 contained in charge number S-CE-261-S, as presently written, do not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must be served on the respondent and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before July 29, 1985, I shall dismiss these allegations from your charge. If you have any questions on how to proceed, please call me at (916) 322-3198.

Sincerely yours,

Robert Thompson
Regional Attorney

cc: Ron Rosenberg (Express Mail)

State of California **EXHIBIT I** Department of Developmental Services

Memorandum

Memorandum

To LABOR RELATIONS COORDINATORS MAY 7 1985 , 1985

SONOMA STATE HOSPITAL SUBJECT: **Access and Bulletin** Board Space for CWA for CWA and CAPT

From : **Gary W. Scott**
Labor Relations Specialist
Labor Relations Branch

As you may be aware, an election will be conducted by the Public Employee Relations Board (PERB) for the right to represent employees in Bargaining Unit 18, The enployee organizations that will appear on the ballot are the Communication Workers of America (CWA) and the California Association of Psychiatric Technicians (CAPT). Hospitals should expect a significant increase in organizing activity by both enployee organizations during the campaign period from now until mid July 1985.

The Unit 18 MOU, Article XII, contains provisions on access, distribution of literature, use of State facilities and bulletin boards. These contractual rights are not effected by the PERB election process and provides CWA the means to gain access to the unit break rooms, post Oft materials and the use of enployee organization rooms.

Until the conclusion of the PERB election process, the Department has agreed with the CAPT to the following regarding access, posting of materials and the use of State facilities:

1) Representatives of the CAPT may be granted access to non-work areas such as the enployee cafeteria(s), enployee organization room(s) and other non-work areas outside the living units;

2) Representatives of CAPT may be granted the use of employee organization bulletin boards outside the living units for posting of materials;

3) Hospital employees representing the CAPT may be granted access to the employee break room in the living units. One or more (equal to the number of program in the hospital) employees nay be designated by the CAPT to be privileged with such access. CAPT will submit a written verification of their designation(s) to the Hospital Labor Relations Coordinators. Persons so designated must be employees of that hospital, Changes shall be kept to a minimum.

   a) Notice of the intent to exercise access privileges to unit break rooms must be provided to the appropriate Program Director at least twenty-four (24) and not more than seventy-two (72) hours in advance.

   b) Neither the designated enployee representative nor the enployee to whom literature is being distributed may be on work time.

c) Except for the enployee ocean rooms, the distribution or display of all employee organization literature is prohibited in all living units.

d) Copies of fell employee organization literature to be distributed or posted in the enployee break room will be provided to the Hospital Labor Relations Coordinator in advance.

4) No access will be permitted during the nocturnal shifts; and,

5) Space for posting CAPT materials will be provided in living unit break rooms and other areas outside the resident living units where such, employee organization material is normally posted.

Access for both employee organizations should not be unreasonably denied"; however, access may be deferred for reasons related to client care, privacy, safety, security or other necessary business reasons.

This memorandum should be provided to all Program managers and Unit Supervisors. Managers and supervisors are reminded to maintain absolute neutrality in such an election process.

Should you have any questions regarding this matter, you may contact me a '(916) 323-7777; (ATSS) 473-7777.

cc: Jim Moore
Ivonne Richardson

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
HEADQUARTERS OFFICE
1031 18TH STREET
SACRAMENTO, CALIFORNIA 95814
(916) 322-3088

July 24, 1985

Ronald Rosenberg. Esq.
Lav Offices of Ronald Rosenberg
1730 K Street. N.W.. Suite 1004
Washington, D. C. 20006

Re: Communication Workers of American. Psych Techs. Local 11555 v. State of California (Department of Personnel Administration and Department of Developmental Services)
Unfair Practice Charge No. S-CE-261-S

Dear Mr. Rosenberg:

Pursuant to our telephone conversations of July 23. I am writing to clarify Bob Thompson's July 22 letter . more specifically the section regarding allegations Nos. 1-4, and 9 on pages 6-8.

It is our understanding that Charging Party argues that the February 26 Ivonne Richardson letter, the March 5 Gary Scott memorandum and the other memoranda allegedly posted in the State hospitals demonstrate favoritism by the State employer toward CAPT. You assert that these memoranda violate SEERA section 3519(d) because they tend to influence an employee's choice between CAPT and CWA and/or provide stimulus in the direction of CAPT. Santa Monica Community College District (1979) PERB Decision No. 103; Clovis Unified School District (1984) PERB Decision No. 389. This argument is based primarily on the language of the memoranda which used the terms "recognized," "employee organization." "agreement," and "CAPT representative." However, a fair and impartial reading of these documents does not support the argument that they tend to influence an employee's vote in favor of CAPT.

February 26. 1985 - Ivonne Richardson Letter

This letter (Exhibit A to the original unfair practice charge) was written in response to an inquiry from a CAPT advisor. Kenneth Murch. It notifies CAPT that they have been recognized as an employee organization under section 3513(a) of SEERA. This section of SEERA solely defines an employee organization as opposed to section 3513(b) which defines a "recognized employee organization" as an exclusive representative of

EXHIBIT B

employees. The Richardson letter also recites language contained in Mr. Murch's initial inquiry and concludes with a description of the organization's access rights. This discussion is framed in the context that CAPT is accorded the same access rights as "any employee organization making a decertification attempt." There is nothing in either the language or tone of this letter which indicates that the State is supporting CAPT, granting CAPT any preferential rights, or placing the imprimatur of the State on CAPT.

March 5, 1985 - Memorandum from Gary Scott to Labor Relations Coordinators

This memorandum was written to serve as a cover document for the Richardson letter. (Exhibit B to the original unfair practice charge.) As such, it repeats the statements of the Richardson letter recognizing CAPT as an employee organization under SEERA, identifying CAPT as an organization formed to represent the interests of psych techs currently engaged in a decertification campaign against CWA and briefly repeats the access rights afforded to CAPT. Essentially this memorandum merely repeats the information previously provided in the Richardson letter. Accordingly, there is nothing in this memorandum which would give employees the impression that the State favored CAPT.

May 3. 1985 - Scott Memorandum to Labor Relations Coordinators

This memorandum issued following the establishment of a question concerning representation by PERB and states that a decertification election will take place between CWA and CAPT. It then reviews CWA's access provisions contained in Article 12 of the memorandum of understanding, states that these rights are not affected by the PERB election process, and reviews the access rights of CAPT representatives and employees representing CAPT. Finally it states that access for both employee organizations should not be unreasonably denied but may be deferred for appropriate reasons. In closing, it cautions that "managers and supervisors are reminded to maintain absolute neutrality in such an election process."

Even in a light most favorable to Charging Party, this memorandum cannot be read fairly to reflect an attempt by the State to influence the employee's choice in favor of CAPT. This memorandum serves basically to provide information that a

decertification election campaign would be conducted in the hospitals, that each organization had access rights during this campaign, and that the supervisory and managerial employees of the State were to maintain strict neutrality during this campaign. The wording of this document is insufficient to support the finding of a prima facie violation of SEERA section 3519(d).

As discussed on the phone and briefly reviewed above, the general weaknesses of these allegations we were attempting to point out relate primarily to the fact that each of the posted communications, read in its entirety, seems to grant CAPT nothing more than the access to which it is entitled under the PERB case law discussed in Bob Thompson's letter. CWA has not alleged that it is unusual for a wide variety of communications to be posted on the various bulletin boards subject to view by Unit 18 employees. Nor. as Bob indicates, has CWA alleged that the state employer has acted toward CAPT in a manner consistent with the interpretation of the communications and their posting that CWA urges. It has not been demonstrated that the state employer has negotiated with CAPT with respect to wages, hours or working conditions of Unit 18 employees, nor allowed CAPT designees to represent Unit 18 employees in grievance or arbitration matters. Hence, given the overall context of the communications in which words such as "recognized" "representatives" and "agreement" were used and the lack of other action by the state employer which might lend credence to CWA's interpretation, we question whether Unit 18 employees were misled by the communications into believing either that CAPT had achieved a status to which it was not entitled or that the state employer was urging them to support CAPT by implying that their terms and conditions of employment would improve if CWA were decertified.

A further consideration, as Bob Thompson indicates, is the employer's right of free speech. Assuming that Unit 18 employees are discriminating enough to recognize that CWA has not been replaced by CAPT as the exclusive representative, the state employer's actions in drafting and posting the various communications in issue might still raise the implication that the state favors CAPT over CWA. The Board, in dealing with speech, as opposed to other forms of employer conduct alleged as a basis for finding a violation, has stated that speech does not constitute a violation, regardless of the existence of a question concerning representation, unless it contains a threat

of reprisal or force of promise of benefit. Santa Monica Unified School District and Santa Monica Community College District (1978) PERB Decision No. 52.

Both Santa Monica Community College District, supra, and Clovis Unified School District, supra, on which you rely, identify employer "speech" as part of the totality of circumstances to be considered in evaluating an unlawful assistance charge. In those cases, the employer "speech" attributed the benefit or detriment of other, unlawful, employer conduct to an employee organization, thus, tending to encourage or discourage employee support. None of the memoranda in this case do that. Further, it has not been demonstrated that CAPT is other than an independent employee organization established for the purpose of representing Psych Techs in dealings with their employer. Assuming the accuracy of statements to that effect, the letter and memoranda indicate no employer preference of CAPT over CWA. Hence, unless there is something unusual about the extent or manner of posting of the communications in issue, they do not seem to constitute evidence of unlawful employer assistance.

I hope this will clarify any possible misunderstandings you may have had concerning the rationale contained in our July 22 letter regarding this aspect of your charge. In order that you might have sufficient time to prepare and file an amended charge in this case if you so desire, the deadline for such is extended to July 31, 1985. If you have any questions on this matter, please contact me or Bob Thompson.

Sincerely yours.

Dennis Sullivan
General Counsel

cc: Howard Dickstein

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COMMUNICATIONS WORKERS OF AMERICA. PSYCH TECHS. LOCAL 11555. Charging Party, V. STATE OF CALIFORNIA (DEPARTMENTS OF PERSONNEL ADMINISTRATION. DEVELOPMENTAL SERVICES AND MENTAL HEALTH). Respondent.	)	Case No. S-CE-261-S COMPLAINT (Unfair - SEERA)

It having been charged by Communications Workers of America, Psych Techs, Local 11555 that State of California (Departments of Personnel Administration, Developmental Services and Mental Health) has engaged in certain unfair practices in violation of California Government Code section 3519 the General Counsel of the Public Employment Relations Board (PERB) on behalf of the PERB, pursuant to California Government Code sections 3541.3(h) and (i) and California Administrative Code, title 8. part III. sections 32620(b)(6) and 32640, issues this COMPLAINT and alleges that

1. The Respondent is the State Employer within the meaning of Government Code section 3513(i).

2. The Charging Party is a recognized employee organization within the meaning of Government Code section 3513(b).

3. Before June 11, 1985, Respondent's policy concerning access for non-employee representatives of Charging Party was governed by Article XII section 1 of the Memorandum of Understanding (MOU) between Charging Party and Respondent. This section provided that the representative identify himself/herself to the facility labor relations coordinator who made necessary arrangements for access to employees.

4. On or about June 11, 1985, Respondent changed this policy by requiring 24 hour advance notice including the name of the employees to be contacted and a summary of the proposed discussion.

5. Before June 20, 1985, representatives of Charging Party were allowed to place telephone calls from the employee organization room at Patton State Hospital to destinations outside the hospital without charge.

6. On or about June 20. the Respondent changed this policy by initially preventing any calls from being completed and on or about June 26, 1985, requiring that these calls be billed to the Charging Party.

7. Before May 22, 1985, representatives of the Charging Party were allowed by the Respondent to leaflet on Patton Avenue near Patton State Hospital in accord with the provisions of Article XII section 2 of the MOU.

8. On or about May 22. 1985. Respondent changed this policy by refusing to allow Charging Party's representatives to leaflet at this location.

9. Respondent engaged in the conduct described in paragraphs 4, 6 and 8 above without prior notice to the charging party and without having afforded the charging party an opportunity to meet and confer over the decision to implement the change in policy and/or the effects of the change in policy.

10. By the acts and conduct described in paragraphs 4 through 9 above. Respondent has failed and refused to meet and confer in good faith in violation of Government Code section 3519(c).

11. This conduct also constitutes derivative violations of Government Code sections 3519(a) and (b).

12. On or about June 4, 1985, the Respondent, acting through its agent. Personnel Officer/Labor Relations Coordinator Denise P. Bates issued and caused to be posted on employee organization and unit bulletin boards a memorandum addressed to all managers and supervisors which removed one job steward for Charging Party and identified seven employees as job stewards for CAPT.

13. During the spring of 1985. Respondent provided CAPT the use of the Executive Conference Room at Stockton State Hospital for two meetings with Psychiatric Technicians.

14. On the same day as the first meeting described in paragraph 13 above, the Chief Steward for Charging Party at

Stockton State Hospital was told by an agent for the Respondent. Program Director Jake Myrick in the presence of other Psychiatric Technicians, "I hope they beat the hell out of you."

15. On or about June 17, 1985 Respondent caused CAPT campaign literature to be delivered to the work stations of Psychiatric Technicians at Sonoma State Hospital contrary to the hospital policy which only permitted delivery of business mai1.

16. On or about March 5. 1985, the Respondent, acting through its agent. Labor Relations Specialist Gary Scott, issued a memorandum to all labor relations coordinators which contained a copy of a February 26. 1985 letter from Ivonne Ramos Richardson. These two documents were subsequently posted by the Respondent on management and employee organization bulletin boards throughout the hospital system.

17. By the course of conduct described in paragraph 3 through 16 above. Respondent has contributed support and/or encouraged employees to join CAPT in preference to Charging Party in violation of Government Code section 3519(d).

18. By the course of conduct described in Paragraphs 12 through 16 above. Respondent has interfered with the rights of employees to exercise their rights guaranteed by the State Employer-Employee Relations Act (SEERA) in violation of Government Code section 3519(a).

19. By the course of conduct described in paragraphs 12 through 16 above. Respondent has denied Charging Party rights guaranteed by the SEERA in violation of Government Code section 35l9(b).

Any amendment to the charge shall be processed pursuant to California Administrative Code, title 8, part III. sections 32647 and 32648.

DATED: August 6. 1985

DENNIS M. SULLIVAN
General Counsel

By _____
Robert Thompson
Regional Attorney

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
SACRAMENTO REGIONAL OFFICE
1031 18TH STREET, SUITE 102
SACRAMENTO, CALIFORNIA 95814
(916) 322-3198

August 6. 1985

Christopher W. Waddell
Labor Relations Counsel
Department of Personnel Administration
1115 11th Street
Sacramento, CA 95814

Re: Communication Workers of America. Psych Techs. Local 11555 v. State of California (Departments of Personnel Administration. Mental Health, and Developmental Services)
Unfair Practice Charge No. S-CE-261-S. Fourth Amended Charge

Dear Mr. Waddell:

I am writing in response to your requests of July 15 and 16, 1985 that the above-referenced charge be deferred to arbitration under the Memorandum of Understanding (MOU) between the Communication Workers of America (CWA) and the State of California (State).

These requests were based on the argument that the conduct alleged to be an unfair practice is covered by Article I, section 1 and Article XII of the MOU.

Section 3514.5(a) of SEERA states in pertinent part:

> . . . the board shall not do either of the following: . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

PERB Regulation 32620(b)(5)[1] requires the Board Agent

---

[1]PERB Regulations are codified in the California Administrative Code, title 8.

processing the charge to "(d)ismiss the charge or any part thereof as provided in Section 32630 if . . . it is determined that a complaint may not be issued in light of Government Code sections 3514.5, 3541.5 or 3563.2 or because a dispute arising under HEERA is subject to final and binding arbitration." In Dry Creek Joint Elementary School District (7/21/80) PERB Order No. Ad-81a,[2] the Public Employment Relations Board (PERB) explained that:

> [W]hile there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. (Footnote omitted.) EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608.)

In Collyer Insulated Wire 192 NLRB 837, 77 LRRM 1931 (1971) and subsequent cases, the NLRB articulated standards under which deferral is appropriate in pre-arbitral situations . These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

Although the second requirement of this standard appears to have been met in this case, the first and third requirements have not. First, there are factors which indicate that an unstable bargaining relationship may exist. This bargaining unit underwent a decertification election during June and July 1985. It is unclear whether CWA will remain the exclusive representative. Under similar circumstances the National Labor Relations Board has declined to defer an unfair labor practice charge to arbitration. Seng Co. (1973) 205 NLRB 200 [83 LRRM

---

[2]Although this case arose under the Educational Employment Relations Act (EERA), it is equally applicable to cases under SEERA as sections 3541.5(a) of the EERA and 3514.5(a) of the SEERA are identical.

1577]. In addition, two unfair practice complaints have issued against the State, one alleging the formation of a dominated employee organization and the other illegal assistance to a rival employee organization.

Second, the conduct complained-of in the charge is that the State assisted CAPT. Essentially, Article I, section 1 of the MOU is an agreement by the State to recognize CWA as the exclusive representative of all employees in the Psychiatric Technician Unit. It does not expressly prohibit the State from providing assistance to another employee organization which is attempting to displace CWA as exclusive representative. Even if CWA could prove that the State had assisted CAPT the MOU would not necessarily have been violated. Thus. Article I. section 1 of the MOU and its meaning does not lie at the center of the dispute. Although Article XII of the MOU concerns some of the allegations contained in the charge, it does not cover them all. For example, there is nothing in Article XII or any other article of the MOU which concerns the use of telephones or the delivery of personal mail to the work site. Where a case involves two issues, one deferrable and one non-deferrable, the NLRB is inclined to entertain both issues to avoid litigation of the same issue in a multiplicity of forums. Sheet Metals Workers' International Association. Local No. 17. AFL-CIO (George Koch Sons. Inc.) (1972) 199 NLRB 166. See also John Swett Unified School District (1981) PERB Decision No. 188. This is especially true in this case where the employer's alleged assistance to CAPT must be viewed as a totality of conduct.

Based on the unstable bargaining relationship, the Seng Co. case, the fact that only some allegations are covered by the MOU, and the intertwined nature of the allegations, the request for deferral is denied.

Sincerely,

Robert Thompson
Regional Attorney

cc: Ronald Rosenberg
Howard Dickstein